ternal Revenue, Respondent-Appellee, to the end that this cause may be reviewed and determined by this court as provided by the statutes of the United States; and that judgment herein of said United States Circuit Court of Appeals be reversed by the court, and petitioners have such further relief as to this court may seem proper.

Dated this 22nd day of July, 1943.

PERRY J. STEARNS,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. OPINIONS OF COURTS BELOW

1. The opinion in the United States Board of Tax Appeals, now United States Tax Court, promulgated March 18, 1942, is reported in Vol. 46 U. S. B. T. A. 705, and the opinion of the United States Circuit Court of Appeals, rendered April 8, 1943, is reported at 134 F. (2d) 796. (T. 176)

II. JURISDICTION

1. The date of the judgment by the Circuit Court of Appeals to be reviewed is April 8, 1943, (T. 184) and motion for rehearing made April 23, 1943 was denied May 10, 1943. (T. 190)

2. The statutory provisions which are believed to sustain the jurisdiction of this court are: 28 U. S. C. A., Sec. 347, (Judicial Code Sec. 240; Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Jan. 31, 1928, c. 14, Sec. 1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926), and 28 U. S. C. A., Sec. 377, (Judicial Code, Sec.

262; R. S. Sec. 716; March 3, 1911, c. 231, Sec. 262, 36 Stat. 1162.)

3. The following facts show that the nature of the case and the rulings below were such as to bring it within the judicial provisions relied on.

(a) Fannie Wells Norris, of Milwaukee, Wisconsin, died testate on April 26, 1937, a resident of said city. (T. 13) On May 3, 1937 her will was duly admitted to probate by the County Court for Milwaukee County, State of Wisconsin. (T. 13) On the same day petitioners were named as executors of said will, and on September 13, 1937 petitioners were appointed trustees under her will, and letters of trust were issued to them. (T. 13)

The will of said deceased provided, at Item 18, paragraphs (R) and (T):

> *Item Eighteen:* All the rest, residue and remainder of my estate, real, personal and mixed, of whatsoever the same may consist, and wherever the same may be, I give, devise and bequeath unto my trustees hereinafter named, the survivor of them and their successors, in trust, to have and to hold the same during the continuance of the lives of —
>
> my son, Daniel Wells Norris,
> Francis D. Weeks,
> Mabel F. La Croix,
> Helen Bradley and
> Elizabeth Durham,
>
> all of whom are named and identified in this will, and the survivors and survivor of them, and thirty (30) years after the death of such survivor.
>
> I direct that my said trustees shall have entire control and management of the trust property committed to their care, invest and re-invest the same, change investments and sell, pledge and dispose of all such trust property as they, from time to time shall deem best, and collect all moneys, principal and income, that may be owing, and dispose of said principal and income as herein directed.

(R) If and when said trustees are satisfied that they shall have in their possession trust property more than sufficient to meet in full all the previous requirements of my will, then I direct said trustees to pay out of the principal of the trust property in their possession to Columbia Hospital of Milwaukee, Wisconsin, meaning the corporation by that name conducting a hospital near Milwaukee-Downer College, a sum not exceeding Five Thousand Dollars, ($5,000). (T. 3, 26)

(T) After my trustees shall have paid to Columbia Hospital the sum of not exceeding Five Thousand ($5,000) Dollars as set forth above, I authorize and empower them whenever and as often as they are satisfied that they have in their hands ample funds to fulfill all the requirements of my said will, at their discretion and option, to pay to any worthy charitable, religious or educational corporation, association or enterprise operating in the city of Milwaukee, Wisconsin, such sums of money out of the principal in their hands as they may deem best, with the suggestion which is not mandatory, that the enterprises which I have been interested in be given the preference. (T. 4, 26) (T. 178)

On July 25, 1938 the trustees under said will became satisfied that they had trust property in their possession more than sufficient to meet all the previous requirements of the will, and paid to Columbia Hospital, mentioned in said paragraph (R), the sum of $5,000.00. On July 25, 1938 also the trustees became satisfied that they had in their hands ample funds to fulfill all the requirements of the will within the provisions of said paragraph (T), and in the exercise of their discretion and option they determined to pay and paid to Norris Foundation, a charitable corporation within the meaning of the will, money and property in the sum fixed by stipulation at $284,341.10. (T. 13, 14)

The day following, July 26, 1938, the executors filed a federal estate tax return with the Collector of Internal Revenue at Milwaukee, Wisconsin, in which they claimed deductions for said transfers to Columbia Hospital and Norris Foundation (T. 5, 14, 121, 141). Because of changes in valuations (T. 138, 139) made by the auditors for the Commissioner, and an understatement in the return (T. 5), the amount of the deduction for the transfer to Norris Foundation taken at $262,511.12 (T. 14, 121) it is stipulated that if the deduction to Norris Foundation is allowable it should be allowed at $284,341.10. (T. 14) The stipulation further provides that Columbia Hospital and Norris Foundation are corporations organized and operated exclusively for religious and charitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of either of which is devoted to carrying on propaganda or otherwise attempting to influence legislation. (T. 14) These are tests set up by Sec. 303 (a) (3) Act of 1926 (I. R. C. Sec. 812 (d)). Said deductions of transfers to these two charities, Columbia Hospital and Norris Foundation were both disallowed by the Commissioner. (T. 141)

The computation made by the Commissioner, based upon increases in valuations and disallowances of deductions resulted in a determination of additional estate tax liability or a deficiency, being the difference of $68,294.82 between the total tax found by the auditor and the tax paid shown on the return. (T. 142, 165, 171)

4. Cases believed to sustain the jurisdiction of the court are as follows:

Lau Ow Bew v. U. S., 144 U. S. 47, 125 S. C. 517.

Magnum Import Co. v. Coty, 262 U. S. 159, 43 S. C. 531.

Helvering v. Canfield, 291 U. S. 163, 54 S. C. 368.

Taft v. Commissioner, 304 U. S. 351, 58 S. C. 891.

Hanover Star Milling Co. v. Metcalf, 240 U. S. 403, 36 S. C. 357.

U. S. v. Biwabik Mining Co., 247 U. S. 116, 38 S. C. 462.

III. STATEMENT OF THE CASE

The salient facts have already been stated in the petition at heading I, "Summary" and at heading II (3) "Jurisdiction" above, which statements are hereby adopted as setting forth the necessary facts of the case.

IV. SPECIFICATION OF ERRORS

The Board of Tax Appeals, and the Circuit Court of Appeals erred in holding:

1. That transfers to charity conditioned upon an event to occur after death cannot be allowed as deductions in determining United States estate taxes, where the condition has been performed before the deduction can be allowed, as provided in Art. 47, Reg. 80. (T. 183)

2. That the first paragraph of Art. 47, Reg. 80 does not have the force and effect of law binding upon the Commissioner, and in effect nullifying the provision requiring him to allow the deduction of transfers to charity made before the deduction can be allowed. (T. 181)

3. That the second paragraph of Art. 47, Reg. 80 relates to conditions precedent when the natural and reasonable construction of said paragraph limits its application to conditions subsequent. (T. 181)

4. That charitable transfers to be deductible cannot be made contingent upon a discretionary event to occur after death and which does occur before the deduction can be allowed. (T. 188)

5. That the transfers in question do not relate back to the date of death and speak as if expressly set forth in testatrix's will and in effect that the doctrine of relation cannot be indulged in to support the purpose and intent of Congress. (T. 183, 8)

6. That the discretionary powers exercised by the trustees are not imperative and mandatory testamentary dispositions but mere precatory or personal transfers. (T. 18

7. That the executors and trustees are not the personal representatives of the testatrix, and that their discretionary acts within their lawful powers given by the will are not testatrix's transfers within the meaning of the Act of Congress. (T. 188, 9)

8. That the testamentary character of the transfers in question is not to be determined by Wisconsin law. (T. 18

9. That the Wisconsin law of the case, as determined by the County Court for Milwaukee County, State of Wisconsin, does not require the allowance of the deductions in question. (T. 185)

10. That Columbia Hospital, the beneficiary under Item 18, paragraph (R), could not have compelled the trustees to exercise their discretion, and (T. 189) that the discretionary act, when completed, was not the act of testatrix.

11. In effect that Norris Foundation, after the trustees exercised their discretion and designated it as beneficiary under Item 18, paragraph (T) of the will, could not compel the execution of such designation, as the testamentary act of deceased. (T. 185-9)

V. SUMMARY OF ARGUMENT

Point A. The Commissioner has no discretion to deny petitioners' deductions.

Point B. Commissioner's regulations having force of law provide a limited period after death for charities to meet conditions of will for allowance of deductions.

Point C. Charitable intent of Congress being aided legal presumption of relation back should be applied.

Point D. Wisconsin law determines that the transfers in question were imperative and relate back to date of death.

Point E. Certiorari should be granted.

VI. ARGUMENT

A. *The Commissioner has no discretion to deny petitioner's deductions.*

Where a power is given to public officers the statutory language is peremptory whenever the public interest or individual rights call for its exercise. What a public officer is empowered to do for others he must do. Therefore, if the law requires the deduction of the transfers to charity in question the Commissioner has no discretion but must allow the deductions in the computation of federal estate taxes due from this estate.

Supervisors vs. U. S., 4 Wall. 435, 18 L. Ed. 419.

Mason vs. Fearson, 9 How. 248, 13 L. Ed. 125.

The act in force at the time of the death of Fannie W. Norris was Revenue Act of 1926, effective February 26,

1926, as amended by: Revenue Act of 1928, effective May 29, 1928; Revenue Act of 1932, effective June 6, 1932; Revenue Act of 1934, effective May 10, 1934; Revenue Act of 1935, effective August 31, 1935, and Revenue Act of 1936, effective June 22, 1936. (C. 27, 44 Stat. 9-131; C. 852, 45 Stat. 791-883; C. 209, 47 Stat. 169-289; C. 277, 48 Stat. 680-772; C. 829, 49 Stat. 1014-1028; C. 690, 49 Stat. 1648-1756.)

At testatrix' death Sec. 303 of said Act, as amended, at Subsection (a) (3) (I. R. C. Sec. 812 (d)) provided, (omitting paragraph not material here):

> "For the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a citizen or resident of the United States by deducting from the value of the gross estate—
>
> (3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, or to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals."

By this deduction Congress sought to encourage gifts

to charity by encouraging testators to make provisions for such gifts.

Y. M. C. A. vs. Davis, 264 U. S. 47, 50; 44 S. C. 291, 292; 69 L. Ed. 558.

Edwards vs. Slocum, 264 U. S. 61, 63; 44 S. C. 293; 68 L. Ed. 564.

U. S. vs. Provident Trust Co., 291 U. S. 272, 285; 54 S. C. 389, 392; 78 L. Ed. 793.

In the latter case, Congress was not assumed to have meant to leave its primary aim to be diverted by a purely arbitrary presumption. So here the aim of Congress should not be diverted by administrative disregard of an ancient and reasonable presumption discussed below supporting such aim. As the court below said:

> "* * * Congress intended to reduce the basis of said estate tax by such amounts as were given to charity. We believe also that the Congressional intent was to prefer charity gifts to estate taxes. It was a case of absolute priority. This legislative intent should not be whittled down by judicial construction. If courts are to respect this legislative expressed intent to encourage gifts to charity, we should not approve of the practice of the Commissioner of resolving doubts in favor of the government."

B. *Commissioner's Regulations Having Force of Law Provide a Limited Period After Death for Charities to Meet Conditions of Will.*

The Revenue Act of 1926, quoted above, follows substantially the language of the Revenue Act of 1924, approved June 2, 1924, (c. 234, 43 Stat. 253-355), and the Revenue Act of 1921, effective November 23, 1921, and the Revenue Act of 1918, approved February 24, 1919 (40 Stat. 1057). The Revenue Act of 1918, last mentioned, at Sec. 403 (a) (3) provides: (omitting last sentence not deemed material)

> Sec. 403. That for the purpose of the tax the value of the net estate shall be determined—(a) In the case of a resident, by deducting from the value of the gross estate—
>
> (3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes."

Under this section the Commissioner issued Regulations 37, approved Aug. 8, 1919 which, at Art. 56, contained provisions with respect to conditional bequests, as follows:

> "Art. 56. Conditional bequests.—Where the bequest, legacy, devise, or gift is dependent upon the performance of some act, or the happening of some event, in order to become effective it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed. Where, by the terms of the bequest, devise or gift, it is subject to be defeated by a subsequent act or event, no deduction will be allowed."

This regulation considers, in the first sentence, conditions precedent and, in the second sentence, conditions subsequent. Due to the marked difference between these two varieties of conditions such difference in treatment is necessary. The regulation broadly provides that as to conditions precedent the precedent event must occur before the deduction can be allowed. The deduction can be allowed up to the time of the final assessment of estate taxes (I. R. C., Sec. 874 (a)) which is four years and three

months after death, at the outside, generally. (See also I. R. C., Sec. 821; Reg. 80, Art. 63)

The second sentence, while relating to conditions subsequent, should be read in the light of the preceding sentence so that if the event which confirms the gift has occurred, or the event defeating it has been disclaimed or made impossible, before the deduction can be allowed, then the gift, by the terms of the bequest, is no longer subject to be defeated. This provision (Reg. 37, Art. 56) relating to conditions subsequent is not dependent upon the mere "terms of the bequest" where the facts showed the uncertainty created by such terms to be not "appreciably greater than the general uncertainty that attends human affairs."

> *Ithaca Trust Co. vs. U. S.*, 279 U. S. 1514; 49 S. C. 291; 73 L. Ed. 647.

The Revenue Act of 1921, effective Nov. 23, 1921, we understand was enacted at a time when Art. 56, Reg. 37 was in effect, as quoted above. Accordingly, we believe Congress, by the enactment of the Revenue Act of 1921, adopted Art. 56, Reg. 37 as law.

> *Helvering vs. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 115; 59 S. C. 423, 426.

On July 27, 1922 the Commissioner issued Reg. 63 which, at Art. 50, revised the provisions with respect to conditional bequests to read substantially as they do in Art. 47, Reg. 80, and as in the intervening Regulations 68 and 70, except that the word "where" was changed to "if", the sense being the same.

In the *Reynolds Tobacco Co.* case, it is said: (p. 116)

> "Since the legislative approval of existing regulations by re-enactment of the statutory provision to which they appertain gives such regulations the force

of law, we think that Congress did not intend to authorize the Treasury to repeal the rule of law that existed during the period for which the tax is imposed."

The changes in the Regulations at Art. 50, Reg. 63 and Reg. 68 and Art. 47, Regulations 70 and 80 do not, in our opinion, substantially change the meaning or effect of Art. 56, Reg. 37. At any rate, the language upon which petitioners rely permitting the deduction of conditional charitable bequests, if the act occurs "before the deduction can be allowed" was retained throughout all the regulations which historically might have any bearing upon the regulations in effect at testatrix' death. These words appear in Art. 47, Reg. 80 in effect at testatrix' death.

Art. 47 of Commissioner's Reg. 80, reads as follows:

"If the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.

If the legatee, devisee, donee or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."

As we read Art. 47, Reg. 80 the first paragraph pertains to conditions precedent such as those now before the Court, and the second paragraph to conditions subsequent. The second paragraph is to be read in the light of the first so that if the condition subsequent which might divert the property from charity or defeat the charitable gift has occurred before the deduction can be allowed, then the deduction shall be allowed.

This construction of the regulations is supported by the latest regulations of the Commissioner, Reg. 105, Sec. 81.46, which read:

> Conditional bequest.—If *as of* the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a *precedent* event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable. (Emphasis ours)
>
> If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

The new second sentence of the first paragraph as well as the old second paragraph retained in Regulations 105 above, both relate to conditions subsequent.

It will be noted that the first paragraph now particularly speaks of "a precedent event," and uses "as of," the words of relation back, instead of fixing the time of the occurrence of the event as any time "before the deduction can be allowed." Also, the deduction is to be allowed "unless the possibility that charity will not take is so remote as to be negligible," or as to conditions subsequent "highly improbable." The Commissioner thus adopts the practical construction along with the common rule of relation back apparently. As this change in the regulations

was made to conform to court decision and without any change in the statute quoted above, we believe these regulations are considered by the Commissioner to be declaratory of the law and so relate back to the death of the decedent in the present case. It is clear in this case that as the Regulations provide "the possibility that the charity will not take is so remote as to be negligible." The charities did take and there is no possibility that they will not take. The act of Congress, as it stood when Reg. 105 was issued, is not substantially different from the Revenue Act of 1926, quoted above, so far as the case now before the court is concerned. The change in the regulations was required by judicial decisions, some of them made under revenue acts dating back to 1918. The Commissioner still retains the distinction between conditions precedent and subsequent.

The Revenue Act of 1942, Sec. 408 (a) added parenthetically, after the word "transfers" in Internal Revenue Code Sec. 812(d), the words:

> "(including the interest which falls into any such bequest, legacy, devise, or transfer, as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made prior to the date prescribed for the filing of the estate tax return)."

Such disclaimer may relate to conditions precedent or subsequent, or may be entirely independent of any conditions, thus:

Condition precedent—If a transfer is given to charity if A disclaims, then his disclaimer would be the condition precedent.

Condition subsequent—Or if the transfer be to charity subject to the power of A to defeat the gift by the exercise of certain rights given him by the will, A might disclaim the right to exercise these powers.

Not conditional—Or if the law of the state should prohibit or limit gifts to charity and provide that the heirs should be beneficiaries of the limitation, the heirs might disclaim the benefits of the statute.

The express language of this amendment does not relate to conditions, and so perhaps it is not pertinent to this case. It does not cut down the time provided by Art. 47 in the absence of disclaimer. The court below says: (T. 188-9)

> "We are inclined to the view that the amendment was to avoid controversy and to make it clear that Congress desired no obstacles placed in the path of the charitably inclined. It dealt with the future—did not affect wills or trust agreements which became effective before its enactment. It has no significance in this case."
>
> *Norris vs. Commissioner,* 134 F. (2) 796, 803.

Yet, it is the first approach in any Act of Congress to a specific handling of the question of conditional bequests. It gives legislative support to the regulation of the Commissioner that the condition shall not prevent the deduction provided by law if it occurs before the deduction can be allowed. It has limited the time set by the Commissioner for the allowance of deductions when the "remote possibility" or "high improbability" is aided by disclaimer. Congress now fixes the deadline as to irrevocable disclaimers for tax purposes at a time "prior to the date prescribed for the filing of the estate tax return." In the instant case the condition necessary for the transfer to charity occurred not only prior to the time when the deduction could be allowed, but also prior to the due date of the filing of the estate tax return (T. 13). At all times, until the Revenue Act of 1942, the Act has in terms broadly allowed the deduction of all transfers to charity, and the amendment of 1942 in terms extends the deduction by per-

mitting the inclusion of transfers to charity arising as the result of an irrevocable disclaimer. Previously, the law, by regulation, extended only to transfers dependent on contingencies where the contingency occurred in due time, and, by court decision, where the possibility of the contingency not arising was so remote as to be negligible *Ithaca Trust Co. vs. U. S.*, 279 U. S. 151; 49 S. C. 291; 73 L. Ed. 647, or the diversion from charity highly improbable. *U. S. vs. Provident Trust Co.*, 291 U. S. 272, 285; 54 S. C. 389, 392; 78 L. Ed. 793. The present case arises because of the failure of the Commissioner to apply the regulations to facts falling within their terms.

The Commissioner has at all times recognized, in his regulations, that gifts to charity may be deducted even though conditional if the event occurs in time. This regulation, so clearly in accord with the broad purpose of Congress, would turn the manna of Congress into stone if it were to be held that conditions contained in wills which usually are published for the first time at death must nevertheless have been performed at or prior to death. The reasonable interpretation and construction is that expressly adopted by the Commissioner (but not followed by him) that if the condition has occurred prior to the time when the deduction can be allowed, then the deduction shall be allowed.

The court below (T. 184) (p. 801) quotes an article on "Federal Death Tax" by John E. Hughes, Esq., in which he says:

> "It is the opinion of the author the rule should be that if at the time of the ascertainment of the tax, the condition has been complied with, then the bequest should be deductible, otherwise not. * * * The establishment of the rule herein advocated will result in the allowance of a deduction obviously within the spirit of the beneficient legislation and in the accomplishment of substantial justice."

In our opinion the author does not take a position sufficiently strong. What he should have said is that the Commissioner in Regulations approved by Congress has from the beginning, since 1918 in terms provided for the deduction where the condition has been complied with "before the deduction can be allowed."

At 47, Yale Law Journal, 1354, 1359, it is said:

> "It is highly legalistic to deny deductions for conditional bequests to charity when by the time of assessment the conditions had been fully performed."

In Federal Income Gift and Estate Taxation, by Jacob Rabkin and Mark H. Johnson, of the New York Bar (looseleaf publication in 1942 of Matthew Bender & Company), the authors say at G7, Charities, Sec. 5, p. 3516:

> In all cases, the question of whether the property passes under the decedent's will is one of local law. Dudley S. Blossom Estate, 45 BTA 691. The deduction will not be denied where the specific charitable beneficiaries are not designated, the choice being left to the trustees. Jacob Wasserman Estate, BTA Memo. Dock. 106420, C. C. H. Dec. 12-424-E.

As the court below says, (T. 185) (p. 801) the Commissioner finds important "the necessity of easy, accurate determination of the precise tax due from the estate * * *." The court also says that loop holes should not be permitted, and continues: "Neither objection—to-wit, uncertainty or possible avoidance of the charitable bequest — is here present."

The Revenue Act is very broad in permitting the deduction. The act is not confined to transfers unconditional at death. To restrict the generality of the act invades the legislative power. Yet practical considerations inherent in the law required the Commissioner to fix the greatest

reasonably possible time limit within which a conditional gift to charity must become definite and certain. He fixed the last possible hour within which it can be allowed. Article 47, Regulations 80, therefore, in effect becomes a proviso to the Act.

In "A Discourse upon the Statutes" edited by Samuel E. Thorne of Northwestern Law School, published 1942 by Huntington Library, San Marino, California, the original author states:

> "The provisoes in statutes are the laste parte, and they make a lawe, for in them commenlye the wordes are by aucthorytie before sayde. Of these statutes, yf any be to take advauntage, he muste shewe that he is not conteyned wythin the provisoes, yf they be to his disadvantage."

Also, to take advantage, he must show that he is contained within the proviso if that be to his advantage. The deductions claimed by petitioners could not possibly be disallowed before their estate tax return was duly filed. The conditional event fixed by testatrix occurred before their return was filed (T. 13). Therefore they come within the Commissioner's proviso. To shorten the limit of the proviso later approved by Congress, unduly restricts the broad inclusiveness of charities intended to be benefited by Congress.

The Commissioner and the courts below have denied petitioners the benefit of their conformity to the proviso. The court below (pp. 799, 800) says: (T. 181)

> "Yet petitioners' construction of paragraph one brings us in direct collision with paragraph two of Article 47, which states that if a donee or trustee is empowered to divert the property to a recipient, a direct gift to whom, by the decedent, would not have been deductible, it shall be deemed nondeductible.

A careful reading of this second paragraph of Article 47 would indicate it meant to cover specific charitable bequests made by the decedent, but subject to be defeated by the trustee.

A strict construction of paragraph 2 does not make it applicable to the instant case because here the transfer of the residue was to trustees, of funds to be administered as they directed. There was no power of *"diversion"* of the fund from a testamentarily designated deductible bequest to a nondeductible bequest, but rather a choice between different beneficiaries of a designated class (Milwaukee "charitable, religious or educational association") to be made by the trustees."

We have no quarrel with what the court says in the quotation just made, but rather with the result reached by the court in spite of its statements quoted. The erroneous construction of paragraph two which treats the act of petitioners in nominating Columbia Hospital and Norris Foundation as a diversion is reflected in the quotation by the court from its earlier decision, *Knoernschild vs. Commissioner*, 7th Cir., 97 F. (2) 213, 215, where there was a clear gift to charity affected by an absolute power to divert. The gift to Holy Angels Academy was clearly subject to a condition subsequent. The adoption by the court below of the practical results of its earlier decision is an error which does not conform to the expressions of the court, unless the court intended to say that while a strict construction of paragraph two of the regulations does not make it applicable to the instant case a liberal or reasonable construction would do so. We do not believe the court intended to imply this, and we believe that the reasonable and liberal construction accords with and is no different from what the court says is a strict construction.

Commissioner's phrase "empowered to divert" used in said paragraph 2 is not one of art. So far as we discover

it is unknown to the law of trusts or wills. From 13 *Words and Phrases*, 56, and pocket part, 1942, p. 7, it does not appear that the phrase "power to divert" or the word "divert" has been used in the sense of the regulation. The word "power" is inappropriate to the word "divert" since from the cases there collected it appears that "diversion" is usually done illegally or in excess of power. It involves divestiture. Some person or fund must have title or right before there can be diversion. So payment to Columbia Hospital and Norris Foundation was not a diversion and did not "divert" from charity. Their rights arose from "the performance of an act," (i.e., exercise of the power to pay under paragraphs (R) and (T) of the will) as contemplated by the first paragraph of Art. 47, Reg. 80 and not a power to "divert" under the second paragraph. The words "power to divert" must be used in the sense of a power to defeat or revoke, in whole or in part. 3 *Restatement of the Law of Property*, 1818, Sec. 318(2) says:

> "The term power of appointment does not include a power of * * * revocation * * *."

So the two paragraphs of Art. 47, Reg. 80, are mutually exclusive and not to be confused. Power to appoint to charity is treated at 2 *Restatement of the Law of Trusts*, 1178, Sec. 382. In the pocket supplement of *Wisconsin Annotations*, p. 197, are collected cases in which the trustees had the power to select beneficiaries. The trustees in selecting Columbia Hospital and Norris Foundation were not exercising a "power to divert", as the court below seems to assume. (T. 181)

C. *Charitable Intent of Congress is Aided by Legal Presumption of Relation Back.*

This court has refused to permit the Commissioner to

defeat the deduction of a transfer to charity merely because of a presumption claimed to be irrebuttable, but which the record showed was contrary to fact.

> *U. S. vs. Provident Trust Co.*, 231 U. S. 272, 281, 282; 54 S. C. 389, 391.

It follows that if there are presumptions in the law which support the purpose of Congress, such presumptions should be applied in the absence of practical reasons to contrary. The court below does not treat, adequately, the effect of this presumption, but the court does quote (p. 800) the language of a case which supports the petitioner's position, as follows: (T. 183)

> But where a power of appointment is discretionary, the power being exercised relates back to the period of time of the settlement of the power. That is, in this case, to the date of the testator's death. Therefore, when the power was once exercised, the church took the gift from the settlor, the creator of the power, and not from the trustees themselves, for the reason that the deed created no estate in any one except through the exercise of the power to appoint under the terms of the deed. The tribunal, authorized to appoint, having exercised the power, their act relates back to the settlor and the estate passed from him, as the creator of the power, and not from the trustees. * * *
>
> *Brown vs. Commissioner*, 3 Cir., 50 F. (2) 842, 846.

On this point the 7th and 3rd Circuits clearly disagree. The court below (p. 800) (T. 182) quoted Davison vs. Commissioner, 2 Cir., 81 F (2) 16, 18 as recognizing that the exercise of a power will "for some purposes relate back to the date of the death of the original testator," and might for tax purposes, if timely.

It was stated in *Farmers' Loan & Trust Co. vs. Minnesota*, 280 U. S. 204, 212; 50 S. C. 98, 100:

> Taxation is an intensely practical matter, and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequennces.

An exemption in aid of charity should not depend on considerations wholly unreal and illusory.

> *City Bank Farmers' Trust Co. vs. U. S.*, 2 Cir., 74 F. (2) 692.

It is unreal to deny the deductions in question merely because as to Columbia Hospital the trustees in their discretion might have given less and as to will item 18 paragraph (T) (T. 26) they might have given less or to other charitable purposes. The money was promptly paid to the charities. The Court is confronted with a fact and need not resort to theory. The Court below says (p. 802): (T. 184)

> "To the trustees, there never was doubt as to Mrs. Norris' wishes, or their duty. Filial respect for the mother's wishes may have influenced prompt and decisive action by one trustee. But the fact remains that the trustees seemingly viewed the trust as one clearly requiring them to make disposition of the bequest to Milwaukee charities."

In *Brown vs. Commissioner*, 3 Cir., 50 F (2) 842, the trustees were guided in their discretion by the standard of "the ideals of the settlor" known to them. Here the standards are set up in item 18 paragraph (T) of the will itself.

The presumption that one who takes under the exercise of a power takes from the creator of the power was early stated in 4, *Kent's Commentaries*, 327:

> The party who takes under the execution of the power, takes under the authority, and under the grantor of the power, whether it applies to real or personal property, in like manner as if the power, and the instrument executing the power, had been incorporated in one instrument.

The doctrine of relation back is applied to the issuance of letters testamentary. It is stated at 26 A. L. R. 1359, 1360:

> The doctrine that whenever letters of administration or testamentary are granted they relate back to the intestate's or testator's death is an ancient one. It is fully 500 years old. In the Year Book, 18 Hen. VI. 22, pt. 7, there is a case reported of an administrator maintaining trespass for acts done between the death of his intestate and the issue of his letters.
>
> The doctrine has been accepted with virtual unanimity, since it was promulgated, in a long line of cases."

The same principle of relation back applies to the acts of one having a discretionary power under a will.

Brown vs. Commissioner, 50 F. (2) 842, 846.

In *Chanler vs. Kelsey*, 205 U. S. 466; 27 S. C. 550, 552; 51 L. Ed. 882, the court says:

> In support of this contention, common-law authorities are cited to the proposition that an estate created by the execution of a power takes effect in the same manner as if it had been created by the deed which raised the power; that the beneficiary takes, not under the execution of the power by the donee, but by authority and under grant from the grantor, in like manner as if the power and the instrument which created it had been incorporated into one instrument. 4 Kent, Com. 327; 2 Washb. Real Prop. 320.

The court then held that:

> "However technically correct it may be to say that the estate came from the donor, and not from the donee, * * *."

and

> "Notwithstanding the common-law rule that estates created by the execution of a power take effect as if created by the original deed, * * *."

the exercise of the power was a taxable fact, and the New York law imposing a tax upon the exercise of a power of appointment, was valid. While the common-law doctrine of relation back was disregarded in this case, involving the New York inheritance tax, yet the reasons for its disregard do not exist in the present case, but on the other hand there are strong reasons why the principle should be applied in support of the intent of Congress.

The court below (p. 798) erroneously states the contention of petitioners, as follows: (T. 179)

> Petitioners also contend that the making of the gift through the selection of trustees to designate the charities which were to receive the estate did not make the gift contingent. It is argued that the gift to charity was absolute, even though the beneficiaries were not named, and the amount each was to receive was left to trustees, in whose judgment the testatrix had great confidence.

What petitioners contend is that the transfers to the charities in question were conditional until the trustees exercised their discretion, at which time their acts related back to the date of the death of the testatrix and became her act as absolutely as if provision therefor had been made in her will. Becoming thus absolute the beneficiaries, designated by their discretionary acts, had absolute and enforceable rights to the transfers. Furthermore their duty to exercise their discretion in some manner was imperative by Wisconsin statute.

The trustees having exercised these mandatory trusts for charity, they were absolute and mandatory for the full amounts designated by them. This court has recognized the principle of relation back in a case in which the Commissioner "urged that taxes should not be enforced by what occurs after the taxable event," and "that a compromise occurring after the decedent's death, which is the 'taxable

event' under an estate tax, should not be considered." This court said, in answer to the Commissioner:

> "Whatever may be the general rule in this respect, this Court has clearly recognized, * * * that events subsequent to the decedent's death, events controlled by his beneficiaries, can determine the inclusion or not of certain assets within the decedent's gross estate under Sec. 302(f). * * * The subsequent renouncement by the appointees of the right to receive by appointment and their election to take as remaindermen in default of appointment were held by this Court to place the property subject to the power outside the scope of Section 302(f)."

Helvering vs. Safe Deposit and Trust Co. of Baltimore, 316 U. S. 56, 65; 62 S. C. 929, 930.

Helvering vs. Grinnell, 294 U. S. 153; 55 S. C. 354; 79 L. Ed. 825.

D. *Wisconsin Law Determines that the Transfers in Question Were Imperative and Relate Back to Date of Death.*

The court below states (p. 801) that: (T. 185)

> "The law of Wisconsin governs the construction of this will. The Federal law governs as to the construction and the application of the Federal tax statute, to the estate, the nature and character of which has been fixed by Wisconsin law. *Blair vs. Commissioner*, 300 U. S. 5, 10; 57 S. C. 330; 81 L. Ed. 465.
>
> In other words, the Federal statute grants and defines its gift exemptions. It could have excluded all gifts. It could and did define the gifts it exempted from Federal Estate taxes. Those exemptions thus specified, may not be broadened by Wisconsin decisions.
>
> While we must look to the Federal statute to ascertain the estates which are exempted from taxation, it is the local law which determines the character and nature of the estate which the will creates."

By Federal law, executors were required to show that the charitable natures of the transferees complied with the exemption. This point is stipulated. (T. 14) The Federal law makes the proviso, imposed upon the Act of Congress by the Regulations, that where the transfer is conditional, the condition must have occurred before the deduction can be allowed. Petitioners having complied with the deduction tests fixed by Federal statute, the Board of Tax Appeals, below nevertheless denied the deduction because the transfers were not received "through any act of the testator."

Estate of Fannie W. Norris, 46 B. T. A. 705, 712.

The Circuit Court of Appeals denied the deduction below (p. 802) because: (T. 188)

> "This court, though divided, is of the opinion that Mrs. Norris failed to provide in her will a trust fund which was exempt from taxation * * *.
>
> "In reaching this conclusion, as to which, one member of the court cannot agree, the persuasive factors determinative of the result are: (1) No amounts were specified by testatrix; (2) No charity was named; (3) The language of the will (T) above-quoted, "at their discretion and option" negatives the basis upon which a gift is necessarily dependent.
>
> "The third reason is one upon which the determination of the case largely turns. The precatory language of the will in other places, might have saved the bequest, but for this language of paragraph T of the will. These words, 'at their discretion and option' define, in the opinion of the majority of the court, the character of the gift. Giving these words their only legitimate meaning, there is no justification for our stressing the meaning of the other words used in the same paragraph, to-wit, 'authorize and empower.' It is impossible to neutralize the last words used by the testatrix in this paragraph and convert a kindly wish into a mandatory trust."

Again the court said (p. 801), at the close of discussion under headnote 3: (T. 185)

> "The only serious objection is that the testatrix' gifts to charity are not absolute. They did not pass directly from the testatrix to the charity. The necessity (or contingency) of action by the trustees was present."

The question of whether a provision is testamentary, and whether precatory or mandatory, is to be determined by state law.

By Wisconsin law, the transfers in question were testamentary and mandatory. It is untrue, as stated by the Board of Tax Appeals, that the transfers were not due to any action of the testator. The trustees would have had no authority to make the transfers but for the will. The provisions of the will were an acceptance of the invitation of Congress within the meaning of *Y. M. C. A. vs. Davis*, 264 U. S. 47, 50; 44 S. C. 291, 282, when Congress said to testatrix "If you will make such gifts, we will reduce your death duties * * *."

Wisconsin's Statute on "Powers" was adopted from New York, and Secs. 232.23 and 232.24, Wis. Stats., read as follows:

> "232.23 Trust powers imperative. Every trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative and imposes a duty on the grantee the performance of which may be compelled by action for the benefit of the parties interested.
>
> "232.24 Effect of right of selection. A trust power does not cease to be imperative when the grantee has the right to select any, and exclude others, of the persons designated as the objects of the trust."

In *Will of Doe*, 232 Wis. 34, 39, seq., cited by the court below, the court discusses these sections and says:

> "Powers in trust are presumably imperative rather than purely discretionary." The court goes on to indicate that purely discretionary powers are not lightly to be imputed to the testator.

In *Osborne vs. Gordon,* 86 Wis. 92, 94, 97, a provision authorizing the trustees to invade principal was held to confer an imperative power not affected by the fact that the trustee had discretion as to the degree of invasion, provided such discretion is exercised reasonably, and not abused, the court saying:

> "Such a discretion is by no means unlimited."

In *Will of Doe,* 192 Wis. 333, 335, 336, the court says that in order to create a trust the intention of the testator must be manifest and mandatory, but such a trust may be created by precatory language in a will, and the words "having full confidence" and "it is my wish" are sometimes mandatory.

Will of Platt, 205 Wis. 290, 296, holds:

> "Precatory words in a will are to be given effect as conferring rights whenever they express an intent as distinguished from a mere desire; so far as they denote an intent of the testator they are mandatory; they are imperative if it appears that they were intended to create an obligation."

and quotes *Will of Olson,* 165 Wis. 409, 411, saying:

> "Where the intention of the testator is clear, and where in order to carry out such intention it is necessary to follow precatory words, then such words are not advisory, but mandatory.

The Circuit Court of Appeals below regarded the language "at their discretion and option" in the will, Item 18 (T), (T. 27) as precatory language. (T. 182-9) As the cases show the trust may nevertheless be imperative or mandatory. The petitioners, as trustees, were not absolute owners under mere moral obligations as implied by the footnote citations

of the court below (p. 802) from *Bogert on Trusts and Trustees,* Vol. 1, Sec. 48, and Vol. 2, Sec. 324. They were trustees.

Item 18, paragraph (S) (T. 26) of the will we do not believe has any bearing on this case: First, because the record does not show that the trustees took any action thereunder; and second, because paragraph (T), standing alone, is by statute, we believe, an imperative trust with respect to which the trustees could be compelled to exercise their discretion reasonable in some manner.

The trust created by Item 18 of the Will of Fannie W. Norris, (T. 23) is mandatory, not precatory. Sec. 25 of the Restatement of the Law of Trusts quoted by the court below (p. 802) therefore has no application. (T. 187)

The discretionary powers given the trustees were imperative or mandatory, but if the trustees had failed or declined to act, it is very true that they could not have been forced to act "before the deduction can be allowed." Under the law of trusts they were entitled to more time than the tax law provided at Art. 47, Reg. 80.

The court below agrees (p. 803) (T. 189) that the trust, under Item 18 (R) was absolute and mandatory, but for no more than one cent. This is not in accordance with the rule which requires discretion to be exercised reasonably and not arbitrarily. Such mere token or illusory exercise of discretion would, we believe not be judicially approved.

1. Restatement of the Law of Trusts 483-9, Sec. 187h. and Sec. 187j.

2. Restatement of the Law of Trusts 1178 Sec. 382 in the Wisconsin annotations at p. 197 cites to the effect that

equity will compel exercise of discretion without abuse:

Dodge vs. Williams, 46 Wis. 70.

Sawtelle vs. Witham, 94 Wis. 412.

Hood vs. Dorer, 107 Wis. 149.

Wisconsin recognizes that the personal representatives of a decedent may exercise the same powers, rights, and privileges as the decedent.

Estate of Gallun, 215 Wis. 314, 320.

In *Will of Asby,* 232 Wis. 481, 489, the court said of an executor, "he is interested as the chosen representative of the deceased to see that her will is carried into effect," and quoting *Cowan vs. Beans,* 155 Wis. 417, 418, to the effect that the executor is the representative of a testator charged with a duty of seeing that his will is carried into effect, saying:

> "In our opinion it may be said with equal soundness that an executor is charged with the duty of seeing that the intentions of the testatrix, as he in good faith believes them to be, are carried into effect."

The intentions of testatrix, as reflected by the acts of her nominees, the trustee-petitioners, in the light of Wisconsin Statutes and cases, is not lightly to be disregarded by the Commissioner. The executor represents the person of his testator.

Fox Film Corp. vs. Knowles, 261 U. S. 326, 330, 43 S. C. 365, 6, 67 L. Ed. 680.

The case of *Taft vs. Commissioner,* 304 U. S. 331, 355-6, does not negative our claim that the state law not only creates legal interests and rights, but also determines when such legal interests and rights were created. *Taft vs. Commissioner, supra,* held that whereas under the Revenue Acts of 1918 and 1921 the Commissioner was bound by the state law in determining the deduction of claims "allowed

by the laws of the jurisdiction * * * under which the estate is being administered" the act of 1924 permitted the deduction of claims only to the extent incurred for fair consideration. The court held that Congress intended to narrow the class of deductible claims. It did not overrule the principle of *Lyeth vs. Hoey*, 305 U. S. 188, 193 59 S. C. 155, 158, in which the court expressly held:

> "Undoubtedly the state law determines what persons are qualified to inherit property within the jurisdiction. * * * The local law determines the right to make a testamentary disposition of such property and the conditions essential to the validity of wills, and the state courts settle their construction."

The state court decisions cited by us therefore show that the will is to be construed as including the transfers to Columbia Hospital and Norris Foundation to the same extent as if the transfers made had expressly been provided in the will. Anything said on the subject in *Davison vs. Commissioner*, (2 Cir.) 81 F. (2d) 16, 18, is *obiter dicta*, because as stated:

> "Here the charitable bequests remained *in vacuo* for a long time, and not until six years had elapsed was the ambulatory power to divert the $400,000.00 from charitable objects renounced by the donee of the power in a way that was irrevocable."

The performance of the condition necessary to the deduction of the charitable bequest occurred after the time when the deduction could be allowed and, therefore, fell outside the proviso of the regulations.

Mississippi Valley Trust Company vs. Commissioner, 8 Cir., 72 F. (2d) 197, 199, was a case where the taxpayers secured a construction of a will in "an uncontested consent order wherein this particular matter was not directly called to the attention of the court." The court says (p. 200):

> "State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law."

The court held that no power had been created in the will and consequently the gift was not testamentary since, as the Board of Tax Appeals held, a gift to be deductible must by the Revenue Act be testamentary. A gift clearly not so cannot be made so by an *ex parte proceeding.*

Since the testator, (Firmin Desloge) with respect to the charitable gifts, said: "I therefore make no such bequests herein." (72 F. (2) 197, 200), what the court says about testamentary bequests is *obiter dicta.* The court said (p. 199) that there are three so-called "powers", and "The first of these is where a power exists coupled with a mandatory duty to exercise it."

While there was evidence in the *Mississippi Valley* case to support the finding of the Board of Tax Appeals that the case was not testamentary, yet in the instant case, there is no such evidence. As a matter of law, there being no evidence to support any finding by the Board of Tax Appeals that the transfers to Columbia Hospital and Norris Foundation were not testamentary, such transfers were and are testamentary.

We have shown above that petitioners herein, as trustees, were bound to exercise their discretionary power because, by Wisconsin statute, the power is imperative. This does not mean that they had to exercise it within the time of the proviso (Art. 47, Reg. 80) nor that they had to exercise it in favor of Norris Foundation, but since it was mandatory and they have exercised their power by an irrevocable act of discretion, Commissioner and courts must take the factual situation as thus unalterably developed, and apply the law and the proviso accordingly.

The case of *Robbins vs. Commissioner,* 1 Cir., 111 F. (2d) 828, 832, is not controlling in the present case since the transfer to Amherst College was not testamentary, court pointing out that "whatever right Amherst College has now came to it through the compromise agreement and not under the will of the testator."

This case purports to overrule *Smith vs. Commissioner,* 1 Cir., 78 F. (2d) 897, 898, but we fail to see any inconsistency or necessity for overruling since, by Massachusetts law, the beneficiary of the compromise agreement took as purchaser from those who received title under the will. *Lyeth vs. Hoey,* 2 Cir., 96 F. (2d) 141. Whereas, in Rhode Island the charitable beneficiary claiming under the compromise agreement took under the will.

Smith vs. Commissioner, 1 Cir., 78 F (2d) 897, 898.

The court below is not entirely correct in saying, (p. 802): (T. 185)

> "No Wisconsin court was ever called upon to construe this will or define this trust."

It is true, there was no construction proceeding, but there was a proceeding to determine inheritance taxes as there is in every estate of sufficient size. Such proceeding was in regular course and the state was represented by counsel for the State Tax Commission, the public administrator of Milwaukee County (T. 150). The County Court for Milwaukee County was required to determine whether as of the date of death there were transfers made by the decedent to charitable corporations within the meaning of Sec. 72.04, Wis. Stats. The court expressly found the names of the legatees and devisees, the distributive share of each, and the exemption to which each was entitled (T. 151), and among others listed Columbia Hospital, a charity, as all exempt and paying no tax, and Norris Foundation, a charity, as all exempt and liable for no tax. The Wisconsin

inheritance tax law, like the Federal, is computed upon the value of the estate at the time of decedent's death, and the exemptions provided by statute lower the value of the taxable transfers as of that date.

Estate of Benjamin, 235 Wis. 152, 159.

To be sure, the Wisconsin tax is a tax upon the right to receive. This right, however, must be one arising under the will of the testator, since charitable transfers could not arise by operation of intestate laws of descent and distribution, except perhaps by escheat. Under Federal law, "The estate, so far as may be, is settled as of the date of testator's death. * * * The tax is on the act of the testator not on the receipt of property by the legatees."

Ithaca Trust Company vs. U. S., 279 U. S. 151, 155; 49 S. C. 291.

The latter quoted statement is true with this qualification that necessarily, by the terms of the Revenue Act, at Sec. 303 (a) (3), and Art. 47, Reg. 80, the deduction there provided for depends upon the receipt of property by the charitable legatee. To warrant the deduction there must be an act of the testator, and a receipt by the legatee. Columbia Hospital and Norris Foundation qualify in both respects.

The order of the County Court fixes, as the law of Wisconsin for this case, that these payments were testamentary speaking from the date of death of the decedent, and mandatory since if merely precatory they would not have been allowed as deductions under the Wisconsin law any more than under Federal law.

Estate of Johnston, 186 Wis. 599, 601-605.

While there were no precatory words in this cited case, the result would or should have been the same had there been.

The payments to Columbia Hospital and Norris Foundation were recognized as transfers in the order of the County Court of Milwaukee County determining inheritance tax. (T. 150-4)

By Sec. 72.01 (Wis. Stats.) the Wisconsin inheritance tax is imposed upon transfers, and by Sec. 72.04:

> "All property transferred * * * to corporations of this state * * * for religious, humane, charitable, or educational purposes, which shall use the property so transferred exclusively for the purposes of their organization, within the state * * * shall be exempt."

Conditional transfers in trust are also recognized as exempt transfers by Sec. 72.15 (8), which provides:

> "72.15(8) When property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, divested, extended or abridged, a tax shall be imposed upon such transfer at the lowest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of Sections 72.01 to 72.24, inclusive, and such tax so imposed shall be due and payable forthwith out of the property transferred; provided, however, that on the happening of any contingency or condition whereby the said property or any part thereof is transferred to a person or corporation, which under the provisions of Sections 72.01 to 72.24, inclusive, is required to pay a tax of a higher rate than the tax imposed, then such transferee shall pay the difference between the tax imposed and the tax at the higher rate, * * *."

Wisconsin inheritance taxes are computed as of the date of the death and this statute in effect relates all contingent transfers back to the date of death however long delayed.

E. *Certiorari should be Granted because the Issues Raised are of Great Importance and the Decisions in the Several Circuits are at Variance.*

The issue is of national importancce because discretionary trusts are common throughout the country, and this court has not yet passed upon the merits of a case involving this question. As a result, the circuit courts of appeal are attempting to apply the decisions of this court not involving precedent conditional acts of discretion to situations involving transfers dependent on such acts, and reaching results not in accord with the law and regulations, and are at variance with each other.

In *Humes vs. U. S.*, 276 U. S. 487, 48 S. C. 347, the testator created a trust giving his niece a life estate with remainder to charity in the event she should die without issue before attaining the age of 40. The remainder to charity being vested was subject to be divested by said condition subsequent. The niece was then 15 years of age. The court said:

> "It is clear that Congress did not intend that deduction should be made for a contingent gift of that character."

The court quotes Art. 56, Reg. 37, and the result, in effect, applied the proviso of the first sentence of the Article, that the event "shall have taken place before the deduction can be allowed." Being a condition subsequent, it also gave effect to the second sentence providing that where the gift "is subject to be defeated by a subsequent act or event, no deduction will be allowed."

This question again arose in *U. S. vs. Provident Trust Co.*, 291 U. S. 272, where testator created a trust to pay income to his daughter for life, and upon her death to her lawful issue, and upon her death, without issue, to charities within the meaning of Sec. 403(a) of the Revenue Act of 1918. In this case the life tenant was 50 years of age, and the evidence was such that the possibility of issue was negligible, although as stated in *City Bank Farmers' Trust*

Co. vs. U. S., 2 Cir., 74 F (2) 692, 694, there was some evidence giving a slight basis for such possibility. However, it was such that if the interest had been offered for sale on the open market the possibility "would have been ignored by every intelligent bidder as utterly destitute of reason." Since the operation which prevented the possibility of issue occurred before testator's death, the case does not directly bear upon the issue now presented to the court. The case is principally of interest here because of the assumption by the court, "that Congress could not have meant to leave its aim to be diverted by a purely arbitrary presumption, which, whether applicable or not, to *sustain* another or different policy, would deny the truth and *subvert* the policy of this particular legislation."

Here, we are urging upon the court the well established presumption or doctrine of relation back to *sustain* and not to *subvert* the policy of Congress.

In *Ithaca Trust Co. vs. U. S.*, 279 U. S. 151, 155; 49 S. C. 291, testator gave his wife a life estate with remainder to admitted charities, subject to the authority of the wife to use principal necessary to maintain her in comfort. The Court held that the will set up a standard which could be stated in definite terms of money, and that the income was more than sufficient for the widow's support, measured by these standards. The Court makes a statement which we believe has lead the circuit courts astray. The courts have applied language intended by this Court to apply only to a power to defeat or divert on condition subsequent as if the language applied to a power to appoint or benefit on condition precedent. The language, proper in its place as used by this Court, which has caused misunderstanding is the sentence "It was not left to the widow's discretion." A proper application of this language

was made by the 7th Circuit in *Knoernschild vs. Commissioner*, 7 Cir., 97 F. (2) 213.

Since the invasion of principal was in effect, under the facts of the *Ithaca Trust Co.* case, regardless of the terms of the will, not within the widow's discretion, the language has no application to the case now presented to the court. It is of interest, however, as supporting the regulation, in that before the deduction could be allowed it was clear that the transfer was not dependent upon the power of the widow to invade principal. In other words, this condition had effectually been eliminated before the return was required to be filed and the tax assessed. The question now presented to the court would have been more nearly raised in that case if the income had not been sufficient for the widow's comfort, and before the estate tax return was filed she had made an irrevocable disclaimer of the right to invade principal.

The second question treated by this Court in *Ithaca Trust Co. vs. U. S.*, 279 U. S. 151, 155; 49 S. C. 291, is of equal interest, in that the Court says:

> "The estate, so far as may be, is settled as of the day of the testator's death."

This is the language of relation back for which we contend, but which doctrine so many Circuit Courts recently have not followed.

If the doctrine makes the act of personal representatives or the tribunal named by the decedent the act of the decedent, then the transfer is imperative or mandatory and not precatory or merely left to discretion. The examples of events which occur during the period of administration of an estate or trust bearing upon the computation of the estate tax, and relating back to the date of death as of which the tax is computed, are numerous.

Valuation, construction of will, appointment of executors, and execution of powers all relate back to the date of death and speak as of that date. There is no basis for discriminating against, or distinguishing, discretionary powers from other powers in this respect.

The Court did not make the death of Mrs. Stewart relate back to the testator's death, but the event of her death was an event entailing quite different legal consequences than would have been the event of her disclaimer of any right to invade principal had their been any such possibility. Death is not an expression of the will of the decedent.

There is a practical necessity for the rule that the value of a life estate be taken as of the date of death, and be based on experience tables rather than the experience of the individual life tenant. Mrs. Stewart died within six months of the testator and before the deduction to charity could be allowed. Yet, as the court below says, (p. 799), the Commissioner seeks certainty. The law also seeks certainty. Tax computations speak as of the date of death and most life tenants survive the computation of the tax when the deduction to charity can be allowed. Therefore, the certain and uniform treatment of estates for estate tax purposes requires that valuation be based on experience tables. (T. 182)

This practical necessity does not apply to events intended or contemplated by the testator, and done to carry out his will. The uncertainty of death is to be distinguished from the uncertainty of discretionary events which can be advanced or retarded by human volition. The difference in fact requires difference in treatment. This was recognized by the Commissioner and is reflected in his regulation permitting the deduction to be effected by events

occurring before the deduction can be allowed. (Art. 47, Reg. 80) Such difference is reflected in court decisions in which voluntary acts, including disclaimers and discretionary powers, relate back to the date of death.

Helvering vs. Safe Deposit & Trust Co., 316 U. S. 56, 65; 62 S. C. 925, 930.

Helvering vs. Grinnell, 294 U. S. 153; 55 S. C. 354; 79 L. Ed. 825.

Brown vs. Routzahn, 6 Cir., 63 F. (2) 914.

Brown vs. Commissioner, 3 Cir., 50 F. (2) 842, 846.

Davison vs. Commissioner, 2 Cir., 81 F. (2d) 16, 18.

St. Louis Union Trust Co., vs. Burnet, 8 Cir., 59 F. (2) 922, 926, seq.

Commissioner vs. First National Bank, 5 Cir., 102 F. (2) 129, 131.

Dimock vs. Corwin, 2 Cir., 99 F (2) 799, 802.

Humphrey vs. Millard, 2 Cir., 79 F. (2) 107, 108.

The Court, in this last case, said that the widow's "statutory right to defeat partially the tax-exempt testamentary disposition * * * was in the nature of a power which could be renounced." The Commissioner contended that the waiver, being made after the testator's death, was of no moment for the reason that to be deductible it must be determined from what is known as the date of death. As to this the Court says:

> "But here no uncertainty existed at the time Mr. Crosby died which was inherent in the language of his will."

So, with the will of Mrs. Norris there is no uncertainty inherent therein. The powers of the trustees are clear and certain and they exercised them without question. The court also says (p. 108):

"While it cannot be said that there was no uncertainty as to the amount of the charitable bequests at the time the testator died, * * * that related only to the validity of the will as an instrument for the transfer of one-half of the residuary estate. When the will was proved and allowed in the Surrogate's Court, it was for the first time judicially determined to be the effective will of the testator in all respects as written. This was not only a decision binding upon the defendants that the will was valid, but that it disposed of the residuary estate as of the date of the death of the testator in a manner exempt from federal estate taxation * * *. It may be said that more or less uncertainty exists as to the validity of any will until it is proved and allowed. But, when it is finally allowed by a court having jurisdiction, all such uncertainty, whatever may have been its degree, is dispelled for all purposes and that as of the instant of the death of the testator. So the uncertanty relied on by the defendants is not the kind which is material to the issue here.

Such difference is also reflected finally in the Act of Congress (Revenue Act of 1942, Sec. 408(c)), which we say is declaratory of the law and amended the estate tax act to reconcile it with court decisions, some of which are cited above. It was not a change in the law, intended to deal only with the future, as the court below holds. (R. 188, 9) (p. 803) If the Commissioner had intended the regulations to provide that conditions not performed at death should prevent deduction, he could have used the words "occur at or before death" instead of the words actually used by him, "It is necessary that the performance of the act, or the occurrence of the event shall have taken place before the deduction can be allowed." It is these words which have been incorporated into the law by subsequent acts of Congress.

Helvering vs. R. J. Reynolds Tobacco Company, 306 U. S. 110, 59 S. C. 423, 425-7.

Rules of statutory construction require that the integration supplied by Congress and the Commissioner shall be followed according to the natural meaning of the words. There is no room to construe the words "before the deduction can be allowed" as if they meant, as the Commissioner now contends they do, "at or prior to death before the deduction can be allowed." These words can not be supplied in the regulations by judicial construction when they are contrary to the clear and unambiguous language of the regulations. The interpolation of these words is contrary to reason since thereby a large class of contingent transfers to charity would be eliminated and the purpose of Congress defeated.

The court below (p. 800) by the quotation from *Gammons vs. Hassett*, 1 Cir., 121 F. (2) 229, 231, that there must be certainty "at the date of the testator's death," judicially interpolates into the regulation these words not approved by Congress, thus defeating and subverting congressional policy.

The decision below (134 F (2) 796) (T. 176-189) is at variance with decisions of other circuits.

In *Brown vs. Commissioner*, 3 Cir., 50 F. (2) 842, the Court allowed the deduction for transfers to charity on facts similar to those before the court. Brown made a trust deed and died within a year. The property included in the trust was held to be part of his estate. The deed gave the trustees discretion to distribute the principal "bearing in mind the ideals" of the settlor. They exercised their discretion after his death. The Commissioner contended the language of the trust gave the trustees power to use the fund for purposes not charitable. The Court held the will, while indefinite, provided a sufficient standard, and the act of the trustees related back and spoke

as of the settlor's death. The present will at item 18(T) creates a standard "to pay to any worthy charitable, religious, or educational corporation, association or enterprise, operating in the city of Milwaukee * * * with the suggestion which is not mandatory, that the enterprises which I have been interested in be given the preference." Since the suggestion is not "mandatory," the language implies that some exercise of discretion is mandatory. The Court below, unlike the third circuit, has declined to have the discretionary act of petitioners relate back and the two circuits are at variance.

In *Levey vs. Smith*, 7 Cir., 103 F. (2) 643, 7, 8, the Court below said it was "not persuaded of the soundness of the reasoning or the correctness of the result reached" in *Brown vs. Commissioner*, 3 Cir., 50 F. (2) 842, but conceded (p. 647) that "under the court's construction of the language of the trust it follows that the settlor of the trust required the trustees to devote funds for a particular purpose, * * * which purpose was a charitable one." The 7th Circuit, however, held (p. 648) that *Levey's* will did not "create a charitable trust which would impose upon Adoniram Lodge the legal duty to treat the legacy as a gift exclusively for * * * charitable purposes." In the decision below (p. 800) the divided court does not this time repeat that "it is not persuaded of the soundness" of the decision in the Third Circuit "in point for petitioners."

In *Davison vs. Commissioner*, 2 Cir., 81 F. (2) 16, 18, the court says:

> "It may well be that a renunciation of a power of appointment would, for some purposes, relate back to the death of the original testator."

The court, however, while thus, in effect, indicating that the law would permit or require the deduction if the power had been renounced before the deduction could be allowed,

nevertheless, because the renunciation did not take place until six years after decedent's death held that the practical certainty required in order to justify the deductions of bequests to charity was not satisfied. The Second Circuit thus indicates that a timely renunciation would have been effective, and so is at variance with the court below.

In *Brown vs. Routzahn,* 6 Cir., 63 F. (2) 914, the Sixth Circuit adopted the principle of relation back and held that a donee who rejected a testamentary gift did not receive the taxable transfer. The Court, we believe, necessarily adopted the doctrine of relation back which the court below rejected.

In *Potter vs. Bowers,* 2 Cir., 89 F. (2) 687, the Court held that the creation of a charitable corporation not in existence when testator died, and no steps taken in its creation until over two years after decedent's death, nevertheless qualified, and, in effect, that the creation of the corporation related back so that income received in the meantime was tax exempt.

In *Mead vs. Welch,* 9 Cir., 95 F. (2) 617, the Commissioner contended that the bequest was uncertain, and its value could not be estimated on the basis of any known data as of the date of death. The Court held that since the record did not show that the heirs did not disclaim under the mortmain statute, the question not raised in the trial court could not be raised on appeal and that the deduction of the entire bequest to charity would not be disturbed.

In *Dimock vs. Corwin,* 2 Cir., 99 F. (2) 799, 800, Mr. Folger bequeathed legacies to his relatives, with remainder for the Folger Shakespeare Memorial Library. After the death of Mr. Folger those who, under the intestate laws of New York, might have shared in his estate executed

written waivers of any objection to his will. The waivers were dated ten days after his death. The Court held that these waivers made after death related back to decedent, and not to the heirs who gave them. The right to withhold them did not constitute a power in the heirs to divert the estate from charity. In this respect the decision is at variance with the decision below.

In *Commissioner vs. First National Bank,* 5 Cir., 102 F. (2) 129, the Georgia code declared void any devise made less than 90 days before testator's death. The charitable bequests in question were made within such period. The heirs renounced their right to contest the bequests. The Court held in effect that the renunciation related back and that the bequest spoke from the will, and that the deduction to charity should be allowed. To this extent the 5th Circuit is at variance with the 7th Circuit below.

In *St. Louis Union Trust Co. vs. Burnet,* 8 Cir., 59 F. (2) 922, 926, there were two charitable transfers involved. As to the first, under Item 6a the gift to the Union Methodist Episcopal Church was dependent upon its continuing as a downtown church in St. Louis, and upon the further condition that the church secure from its membership annual support in an amount equal to at least double the amount of the income from the gift, and other conditions, with the proviso that if after ten years the church failed to meet the conditions, the gift failed. The Court quotes (p. 924, 925) Art. 50, Reg. 63 (1922 Edition), relating to conditional bequests to the effect that the condition must have taken place "before the deduction can be allowed," and says (p. 925, 926):

> At the time of the testator's death, it was impossible definitely to determine whether for the extended period named the church would devote the net income from the stock to the precise uses prescribed, or that

> it would or could secure from its membership annually "an amount equal to at least double the amount of said net income from said preferred stock." Apparently, for a period of six years, no attempt was made to reach such a determination, and then the conditions were sought to be satisfied, not by performance, but by guaranty only.

We conclude, therefore, that if the conditions had been satisfied before the deduction could be allowed the Court would have held the charitable bequest deductible, and if this is correct the Eighth Circuit is then at variance with the Seventh Circuit below. This variance is further indicated by the treatment by the court of the 13th article of the will of George Warren Brown, in said case, which provided that the residue of his estate should go to trustees for five years, and then be devoted to such benevolent purposes as would constitute a fitting testimonial or memorial for the testator, and in some degree extend his usefulness and helpfulness to others. The Commissioner contended that the word "benevolent" was broader than the language of the statutory deduction, i.e., than the word "charitable". Referring (p. 927) to the rule that taxation is intensely practical and that doubts are to be resolved against the government, the Court noted, (p. 929) that the trustees had "authority to select the beneficiaries" and said:

> This would necessarily exclude the conception of a private benefaction beyond the scope of a public charity. The trustees have transferred this fund to the Young Men's Christian Association and to Washington University, both of the city of St. Louis, Mo. * * * We do not contend that what the trustees have actually done is determinative of the petitioner's right to deduction."

It is conceivable that a proper memorial, within the terms of the will, might have been a bronze statue in some public square, and it is doubtful whether such a disposition of the fund would have constituted a charitable transfer.

We contend, therefore, that this case is at variance with the decision below in that the exercise of discretion by the trustees, is a recognition of the doctrine of relation back and of the principle that the act of the trustees is the act of the testator. Whether the discretionary acts of the trustees transferring the fund to the Young Men's Christian Association and Washington University were timely, under the regulations, is not clear to us, and under the construction adopted by the court that the word "benevolent" was equivalent to "charitable" the question of timeliness was in effect eliminated.

In *Mississippi Valley Trust Co. vs. Commissioner,* 8 Cir., 72 F. (2) 197, 199, the court apparently recognized that if the power in that case had been "coupled with a mandatory duty to exercise it," the deduction might have been allowable. It was held not allowable because (p. 200) "lacking in mandatory character," the testator having said "I, therefore, make no such bequests herein." The entire matter was left to his heirs on a precatory basis. We conclude, therefore, that if there had been a real trust in that case, such as Mrs. Norris created, and the trustees had acted within their powers, as here, the transfer to Washington University would have been allowed as deductible. From this we conclude that this case from the Eighth Circuit is at variance with the decision below.

In *Meierhof vs. Higgins,* 2 Cir., 129 F. (2) 1002, testator gave the income of a fund to his sister for life, and if upon her death her husband should be living, one-half the trust fund was to be held for her sister's husband for life. The remainder in either case, and the other one-half in the latter case, was to be paid to testatrix's widow, if living, and if not, to Columbia University. The sister was 74 years of age, her husband 79, and decedent's widow 71 at the time of decedent's death. The Court held that the

valuation of the remainder to Columbia University was presently ascertainable and that Art. 47 must be read in connection with Art. 44, which provides that the deduction may be taken only in so far as the value of the beneficial interest to charity is presently ascertainable, and said (p. 1006):

> "The right to deduct the value in a case like the present depends not on whether it is contingent or vested, but on whether it has an ascertainable market value, * * *."

In recognizing that bequests still contingent after death may be deducted where the value is ascertainable, the decision is at variance with the decision below which appears to hold that a transfer dependent upon a contingency, which has not occurred at or prior to death, is not deductible. The Court below recognized that the values were presently ascertainable, saying (p. 801) that the objection of uncertainty or speculative value is not "here present." The Commissioner has stipulated to a definite value for the deduction to the hospital of $5,000.00 and to Norris Foundation of $284,341.10 (T. 13, 14).

The Court below, (p. 797) quotes Art. 44, Reg. 80 in part, but omits the second paragraph quoted by the Eighth Circuit, above, the first sentence of which provides:

> "If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is *presently* ascertainable, and hence severable from the interest in favor of the private use." (emphasis ours)

The word "presently" does not indicate a moment of time, but rather that reasonable time fixed by the Commissioner and which relates back to the date of death.

Corscott vs. State, 178 Wis. 661, 670.

33 *Words and Phrases*, 464, "Present Time."

In *Beggs vs. U. S.*, Court of Claims, 27 F. Supp. 599, the testator provided that the proceeds from the sale of his estate should, by the executor with the advice of testator's sister, "be divided and distributed and given to such charities and worthy objects" as they should determine. The testator further said:

> "It is my intention to write to my said sister, indicating to her my special friends, charities and worthy objects, I may wish my executor with her advice to provide for, * * *."

The Commissioner argued that the reference to friends and worthy objects permitted the executor to exercise his discretion in favor of objects not charitable within the meaning of the estate tax deduction. Nevertheless, they did distribute it all to tax exempt charitable institutions as was stipulated (p. 606). The Court held that the distribution was made pursuant to the terms of the will, and not as a result of absolute discretion; that the tax exemption should not be narrowly construed, and that the deduction should be allowed. This case is, in effect, at variance with the decision below.

It remains to discuss a few cases which, in principle or result, seem to support the decision below.

In *U. S. vs. Fourth National Bank in Wichita, Kan.*, 10 Cir., 83 F. (2) 85, the testator made a gift to the First Presbyterian Church upon condition that the church should contribute an equal amount, and that work on the commencement of the new church should be started, all within 15 months from the date of the gift, and if the conditions should not have been performed the gift should fail. After the death of the testator there was litigation in the Kansas courts, first concerning the power of the donor to make the gift in view of a joint will with his wife. The Supreme

Court of Kansas held the gift valid. Later a contest arose as to whether the time for the church to comply with the condition of the gift had expired, and the Supreme Court of Kansas held that the time limit was suspended by the litigation. Within two months after the trial of the tax case, under consideration by the court, the building of the church was commenced, and thereafter was completed within a reasonable time. The court (p. 89) quotes Art. 47, Reg. 68. After citing *Ithaca Trust Co. vs. U. S.*, 279 U. S. 151; 49 S. C. 291; 73 L. Ed. 647, and other cases, the court says (p. 90):

> "The determination of a deduction under the statute depends upon the facts and circumstances in each individual case where a condition is attached, and where the gift or bequest is based upon such condition, if the value of that contingent interest can be ascertained by reasonable methods or by recognized data *as of* the date of the death of a testator, the amount for deduction should be so determined and the deduction allowed. * * * (Emphasis ours)
>
> "If the gift is based upon a condition precedent, there being nothing in the record tending to show that the condition had been complied with at the date of the death of the testator, the fund would then remain as a part of his estate and as a consequence the deduction manifestly should not be allowed. * * *
>
> (p. 92) "The gift being based upon a condition precedent the requirements of which had not been complied with at the time of the death of the donor, it cannot be said that at that time the fund was not a part of his estate. This view would likewise seem to be in complete harmony with the applicable Treasury Regulations."

The words "as of" in one paragraph and the word "at" in the next, referring to date of death is inconsistent.

These excerpts tend to show that the Court interprets Art. 47, Reg. 68 in a strict manner, overlooking the doc-

trine of relation back, and the liberal purpose of Congress. It interprets the regulation to mean that the deduction is one allowable at death and, therefore, the act must have been performed or the event have occurred before death. This interpretation appears to have been based upon the language in *Ithaca Trust Co. vs. U. S., supra,* since the court says, (p. 89) of that case:

> "It was held that the value of the bequest to charities at the time of the death of the testator could be reasonably ascertained * * *."

and (p. 90):

> "Here we are confronted with the task of fixing value on a contingency in connection with a church congregation raising a fund approximating $100,000.00 within a given time, which broadly would seem more speculative and uncertain than any of the examples set forth in the reviewed cases, except perhaps the St. Louis Trust Company Case, supra, in which the facts were somewhat analogous and the deduction denied."

We have shown, however, that in the case last referred to by the Court no attempt was made to meet the condition for a period of six years, and as to the second transfer there involved, the court permitted the deduction over the objection of the Commissioner.

The result in the Kansas case may be justified upon the ground suggested, but not expressly stated, by the Court that the litigation involved in two law suits, both going to the court of last resort in Kansas, had so delayed the making of the transfer that it did not occur before the deduction could be allowed within the meaning of the regulations. Since the building was not commenced until two months after the tax case was tried, it clearly appears this event had not occurred before the deduction could be allowed.

In *Burdick vs. Commissioner,* 2 Cir., 117 F. (2) 972, the deduction claimed was for a transfer of $400,000.00 to Lalor Foundation, Inc., a charitable corporation within the statute. The will, probated March 20, 1935, gave $100,000.00 to such educational institution as testator's sister might select, and another $300,000.00 to such institution as might be selected by his nephew. The will stated that he had discussed his wishes with them. They were given the power to be exercised within one year after probate of the will to change educational institutions already selected. On October 14, 1935, Lalor Foundation, Inc., was designated and the bequest paid to it. The Court points out that the deduction is applicable to testamentary dispositions only; that the purpose is to encourage testators to make charitable gifts; and the gifts so made are to be valued as of the date of death for the purpose of determining the amount of the deduction, citing *Ithaca Trust Co., vs. U. S., supra.*

The Court says (p. 974):

> "When the bequest, though charitable, is at the time of death contingent and uncertain ever to take effect no deduction may be allowed."

The Court necessarily makes this concession, however, (p. 974):

> "But there are varying degrees of uncertainty and if the gift is in terms effective *as of* the time the testator died and only an improbable diminution in funds available to pay it creates the contingency it is not too uncertain to be treated as absolute for purposes of deduction." (Emphasis ours)
>
> *Ithaca Trust Co. vs. U. S., supra.*

The court thus used the language of relation back, but did not apply the principle. The court says, referring to the fact that if the tribunal set up by the decedent failed to act, the gifts should fall into the residue, (p. 974):

"The situation comes within the second paragraph of T. R. 80; Art. 47 providing that if the gift may be diverted in whole or in part by the exercise of a power by the legatee, devisee, donee or trustee to a use or purpose which would have made it not deductible had the testator so provided directly in his will the 'deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power'."

In other words, the Court here applies the portion of the regulation relating to conditions subsequent to a transfer dependent upon a condition precedent, and entirely overlooks the portion of the Commissioner's regulation relating to conditions precedent permitting the deduction where the event occurs before the deduction can be allowed, as it did occur in this case of *Lalor's* will. The second paragraph of the regulation, upon which the Court relies, recognizes the principle of relation back to the extent that if the trustees may only divert the trust property to another charity equally exempt, such transfer is effective as fully and to the same extent as if "provided directly in his will."

The distinction between this case and the case below is that there was no trust set up with trustees who might have been compelled to exercise their discretion, as under Wisconsin law the petitioners have an imperative duty to do. *Lalor's* gifts were directly to the institutions to be selected, and possibly the court is right in saying "There was nothing mandatory about it in the will and no one had the legal right to require them to make any designation at all." We believe, however, the case was wrongly decided under the proviso of the regulations and the practical application of the purpose of Congress, since clearly the selection having been made, the transfer was the result of a testamentary provision.

In *First Trust Co. of St. Paul vs. Reynolds,* 46 F. Supp. 497, the will of Frank B. Kellogg, former Secretary of State, was involved. He made gifts to the Protestant Episcopal Cathedral Foundation of the District of Columbia and to the University of Minnesota, subject to the condition that his widow first give her express consent in writing to the making of the transfers. Testator died December 21, 1937, and on September 12, 1938, his widow filed in probate court a written instrument giving her express consent to the payment of the bequests, and they were paid within a few months thereafter. The Court quotes Art. 47, Reg. 80, and *Burdick vs. Commissioner, supra,* wherein it was said (p. 974), referring to the regulation: "It stands as the law which controls the present situation."

The Court says, (p. 499):

> "The statute applicable here is clear. It provides that bequests to corporations organized and operated exclusively for charitable, religious or educational purposes may be deducted from the gross estate. The effective regulation is equally clear. It provides that if a devisee is empowered to divert the property to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so devised, deduction will be limited to that portion, if any, of the property which is exempt from an exercise of such power. * * * The purpose of the regulation is to prevent the deduction of bequests that are conditional or contingent and that ultimately may not be paid. The regulation, in its interpretation of the statutory enactment, is designed to prevent deductions being made on bequests that are conditional and contingent and may be defeated by some subsequent act or event. An objective of the law and the regulations is to prevent the deduction of bequests that are subject to defeasance provisions."

Thus the Court applies the regulation only in part and entirely disregards that portion of the regulation which clearly says that if the event has occurred, then the deduction can be allowed. The court says that the regulation stands as the law, and says (p. 500):

> The general rule requiring adherence to the letter of a statute applies with strictness to taxing acts. *Crooks vs. Harrelson*, 282 U. S. 55; 51 S. C. 49; 75 L. Ed. 156. In case of doubt, taxing statutes are construed in favor of the taxpayer. *Gould vs. Gould*, 245 U. S. 151; 38 S. C. 53; 62 L. Ed. 211."

The Court failed to follow the letter of the statute as reflected in the regulation, and failed to give the natural construction of the regulation which is the one favorable to the taxpayer. The Court also says, (p. 500):

> "There should be no deviation from the plain language of the statute to escape an undesirable result or a hard case."

In view of the "absolute priority" (134 F. (2) 796, 801) (T. 184) of the Congressional intent to prefer charitable gifts to estate taxes the Court should not have deviated from the language of the regulation, and should not have considered the granting of the deduction and the diminution of estate taxes as "an undesirable result." The court quotes *Gammons vs. Hassett*, 1 Cir., 121 F. (2) 235, but does not note that the quotation is from the concurring opinion.

This latter decision influenced the Court below (p. 800), (T. 183) which quoted with approval in the result, language to the effect that a deduction for charity will be allowed "only if the value of the charitable gift can be ascertained definitely at the date of the testator's death."

In *Gammons vs. Hassett*, 1 Cir., 121 F. (2) 229, the decedent, age 92, left a widow, age 93, and by his will provided for a gift to the New England Grenfell Associ-

ation, and the Society for Prevention of Cruelty to Animals, admitted charitable corporations, subject to invasion of the principal by such amounts "as my said wife may at any time, and from time to time, need or desire, to be paid to my said wife during her life." Decedent and his wife had no children. He had no near relatives. She had been bedridden for more than two years before her husband's death, and after his death it was necessary to appoint a conservator for her because of her physical condition. The deduction was denied because the word "desire" was construed to give the widow power entirely to defeat the charitable bequests. On this point the court cites *Knoernschild vs. Commissioner*, 7 Cir., 97 F. (2) 213, a stronger case to the same effect. In the concurring opinion Judge Magruder points out the practical certainty that the transfers to charity would take effect, and intimates that only theoretically is the contingency broader than in the *Ithaca Trust Co.* case. Judge Magruder says:

> "The Ithaca Trust case must be considered as going to the very verge of the law, and in the absence of further guidance from the Supreme Court we ought not to extend the doctrine of that case however logical and appealing the extension might be under the particular facts."

This hackneyed and rather euphemistic expression, "very verge of the law," is possibly true where the facts are analogous. But this statement is not true to the extent that the principles underlying the *Ithaca Trust Co.* case may not be applied to other facts as here.

Petitioners are not asking the Supreme Court to extend the doctrine of the *Ithaca Trust Company* case. The facts of the present case are different from the facts in that case but the principles of that case should be given authoritative application to the present facts. What we are asking

the court to do is to give further guidance with respect to the application of the regulations having the force of law relating to contingent bequests, which the Court below did not apply in accordance with the terms thereof. Such guidance is necessary in order that the Commissioner be required to follow his regulations as approved by subsequent acts of Congress, and the recent interpretation by the amendment of 1942. A situation clearly within the regulation, would have been provided in *Gammons vs. Hassett, supra,* if the widow, with the consent of her conservator, had filed a disclaimer of her right to withdraw any portion of the funds transferred to the two charities in question. At any rate the case, being one of condition subsequent, does not control the present case which depends upon conditions precedent, to-wit, the exercise of the discretionary powers of the petitioners as executors and trustees.

(T. 181)

(T. 188)

In *Watkins vs. Fly,* 5 Cir., June 4, 1943, Opinion on Rehearing, July 7, 1943, (reported at Prentice-Hall Estate Tax Service, paragraphs 62,677 and 62,738) the Court was influenced by the form rather than the substance of the transaction, and the result is at variance with cases involving similar facts, such as:

Commissioner vs. First National Bank of Atlanta, 5 Cir., 102 F. (2) 129.

Humphrey vs. Millard, 2 Cir., 79 F. (2) 107.

Dimock vs. Corwin, 2 Cir., 99 F. (2) 799, affirmed (on other grounds) 306 U. S. 363, 59 S. C. 551.

Mead vs. Welch, 9 Cir., 95 F. (2) 617.

The foregoing collection of cases indicates the confusion and variety of result which obtains in the various circuits in cases involving conditional or defeasible gifts to charity. It is important that the court take jurisdiction of this case in order that the law may be made more definite and certain, that the courts may be guided by correct principles in the future and that justice may be done in this case.

CONCLUSION

WHEREFORE, petitioners pray that a writ of certiorari issue in this case; that the court consider on the merits the refusal of the Commissioner to allow the deductions in question; and that the action of the United States Circuit Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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